No. 23-650

In The Supreme Court of the United States

LAURA JORDAN AND MARK JORDAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

In its brief in opposition (BIO), respondent contends that the issues raised in the petition are unworthy of this Court's review because (1) the Fifth Circuit's decision does not conflict with *Neder v. United States*, 527 U.S. 1 (1999);[1] (2) there is "no meaningful disagreement" among the lower courts concerning *Neder*; and (3) *Sabri v. United States*, 541 U.S. 600 (2004), forecloses petitioners' as-applied challenge to their convictions under 18 U.S.C. § 666. BIO, at 13-30. These arguments lack merit.

I. The Fifth Circuit's Decision Conflicts with *Neder* and *Hurst v. Florida*, 577 U.S. 92, 102 (2016).

Respondent argues that the Fifth Circuit correctly applied *Neder*'s harmless-error analysis notwithstanding the fact that petitioners at trial contested the *quid pro quo* element that the district court failed to include in the jury instructions' definition of "reward"—while, by contrast, Neder did not contest the "materiality" element omitted from his jury instructions. BIO, at 16-17. Respondent also endorses the Fifth Circuit's weighing the supposedly "voluminous" evidence a *quid pro quo* associated with all benefits given to Petitioner Laura Jordan (Laura) by Petitioner Mark Jordan (Mark) against the countervailing evidence that Mark only gave Laura *post hoc* "rewards" for her votes. BIO, at 18-20. Respondent misreads *Neder* and also fails to account for over a

[1] Respondent also argues that there is no "special justification" for overruling *Neder*. BIO, at 24-26.

century's worth of this Court's precedent prohibiting such appellate weighing of competing evidence.

A. *Neder*'s Threshold Requirement for Harmless-Error Analysis: A Defendant Did Not "Contest" the Omitted or Misdefined Element at Trial.

Neder held that its "narrow" rule[2] permits an appellate court to find an omitted or misdefined element harmless only if *both* (1) the defendant did not "contest" the element *and* (2) the evidence of the defendant's guilt of the properly-defined element is "overwhelming." *Neder*, 527 U.S. at 15-17; *see also Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam) (applying *Neder* to misdefined elements).

Conversely, when a defendant at trial objected to the omitted or misdefined element in the jury instructions and contested the prosecution's evidence of that element—as petitioners did—an appellate court should not conduct harmless-error analysis. In that circumstance, an appellate court's deeming the error harmless on the ground that court considers evidence of a properly-defined element to be overwhelming would usurp "the factfinding role reserved for the jury." *People v. Merritt*, 392 P.3d 421, 431 (Cal. 2017) (Liu, J., concurring).

This Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), confirms petitioners' interpretation of *Neder*. After concluding that the Sixth Amendment

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[2] *See Neder*, 527 U.S. at 17 n.2 (noting that the Court's holding only applied to "the narrow class of cases like the present one").

was violated when Hurst's capital sentencing jury was not required to find the equivalent of an "element" rendering him eligible for a death sentence—an element that was *not contested* by Hurst in the trial court[3]—this Court remanded for a harmless-error analysis. In so doing, this Court specifically described *Neder*'s harmless-error test as turning on the fact that the omitted element at Neder's trial (like Hurst's capital sentencing hearing) was "uncontested":

> [W]e do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (*holding that the failure to submit an uncontested element of an offense to a jury may be harmless*). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here.

Hurst, 577 U.S. at 102 (emphasis added).

B. An Appellate Court's Finding of Harmlessness Is Precluded When *Any* Evidence Could Permit a Rational Juror to Possess a Reasonable Doubt About the Omitted or Misdefined Element.

This Court held in *Neder* that, when a defendant did not "contest" the omitted (or misdefined) element at trial, an appellate court still cannot deem the er-

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[3] Brief for Respondent, *Hurst v. Florida*, No. 14-7505, 2015 WL 4607695, at *41.

ror harmless unless the prosecution on appeal demonstrates that there was no evidence at trial "that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. Such an analysis must occur in "typical appellate-court fashion"—meaning an appellate court should "not become in effect a second jury to determine whether the defendant is guilty." *Id.* (citation and internal quotation marks omitted).

This Court has long held that an appellate court, when reviewing erroneous jury instructions to determine whether they harmed a defendant's ability to defend against the charges, must *not weigh* competing evidence on appeal, even if appellate judges consider the prosecution's evidence to be "overwhelming."[4] *Neder* did not overrule those cases; it effectively reaffirmed them. Thus, *any* evidence offered by a defendant at trial that would permit a rational juror to acquit under correct jury instructions, *even if very weak compared to the prosecution's countervailing evidence that clearly is sufficient to convict*, forecloses an appellate court's harmless-error ruling under *Neder*.

Rather than review the evidence in "typical appellate court fashion," the Fifth Circuit instead erroneously weighed the evidence supporting an acquittal of *quid-pro-quo* "bribes" and a conviction of *post hoc* "rewards" against what the Fifth Circuit described as "voluminous" prosecution evidence solely

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[4] *See United Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 407-08 (1947); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *Stevenson v. United States*, 162 U.S. 313, 314 (1896).

of *quid-pro-quo* exchanges of Mark's benefits for Laura's votes. Pet. 21a.

In petitioners' case, assuming *arguendo* that the second step of the *Neder* test is even appropriate in view of the fact that petitioners contested the misdefined element, the record certainly contains sufficient evidence for a rational juror to possess a reasonable doubt about whether the benefits provided by Mark to Laura were *in exchange* for her votes as mayor (as opposed to being offered as *post hoc* "rewards"). Most importantly, in her testimony Laura explicitly denied that her votes were in exchange for, or influenced by, Mark's benefits and had made up her mind to vote for the Palisades development before she met Mark. Pet. 15-16. Furthermore, other evidence—such as Mark's statement to his then-wife that providing benefits to Laura was "the least [he] could do" for Laura's votes, Pet. 14[5]—support a conviction for *post hoc* "rewards" without a *quid pro quo*.

Significantly, respondent, like the Fifth Circuit's opinion, fails to mention the government's explicit concession in the district court that the evidence at trial permitted a rational juror to acquit petitioners of *quid-pro-quo* bribery while convicting them of solely of *post hoc* rewards (with no *quid pro quo*).

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[5] Respondent points to Mark's statement to his ex-wife that he "*owe[d]*" Laura "a lot" because Laura "made [them] a lot of money" (suggesting a *quid pro quo*) but fails to mention that Mark told his ex-wife that it was "*the least [he] could do*" (which suggests a *post hoc* "reward" without a *quid pro quo*). BIO, at 19 (emphasis added); *see also* Pet. 14-15 & n.18 (emphasis added). Like the Fifth Circuit, respondent has failed to view the evidence in a light most favorable to petitioners—a requirement in harmless-error analysis.

Pet. 16. That concession forecloses harmless-error review under *Neder*.

In sum, the Fifth Circuit's harmless-error analysis conflicts with *Neder* in two fundamental ways. First, the court proceeded with a harmless-error analysis despite the fact that petitioners had "contested" the misdefined element. Second, the Fifth Circuit erroneously deemed the alternative-theory error to be harmless based on the circuit judges' perception that evidence of *quid-pro-quo* exchanges of Mark's benefits for Laura's votes was overwhelming compared to the countervailing evidence.

II. A Widespread Division Exists Among the Lower Courts Concerning How to Apply the Harmless-Error Test Set Forth in *Neder*.

Respondent first contends that there is "no meaningful disagreement" among the federal circuit courts concerning *Neder*. BIO, at 20-21, 24. Respondent further argues the conflict between the Fifth Circuit's decision and decisions of some *state* appellate courts applying *Neder* "is irrelevant because a state court's adoption of a more stringent approach to harmless error than the one described in *Neder* would not conflict with the uniform *Neder*-based approach of the federal courts of appeals." BIO, at 22 n.2. Respondent is wrong on both points.

A. There Is Disarray About the Meaning of *Neder* Among the Federal Circuit Courts.

As Judge Lipez recognized a decade ago,[6] there is widespread division among the federal circuit courts concerning *Neder*—both an inter-circuit split and several intra-circuit splits. For instance, in some of their decisions, the First and Fourth Circuits have held that harmless-error analysis under *Neder* is not permitted if a defendant (unlike Neder) "contested" an omitted or misdefined element at trial. *See, e.g.*, *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022);[7] *United States v. Zhen Zhou Wu*, 711 F.3d 1, 20 (1st Cir. 2013) ("[H]ere, the defendants *did* contest the prosecution's [evidence of an omitted element], thus making this case different from *Neder*."). A recent Tenth Circuit decision, *United States v.*

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[6] *United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring).

[7] Respondent contends that the Fourth Circuit has not required the omitted or misdefined element to be "uncontested" for the error to be deemed harmless and, instead, has approvingly cited the decisions of several other circuit courts, which, in applying *Neder*, asked only whether the evidence of the omitted element was "overwhelming." BIO, at 21-22. *Legins* contradicts respondent's position. In *Legins*, the Fourth Circuit, in finding an omitted element in jury instructions to be harmless, required *both* that the omitted element was "uncontroverted" at trial *and* that the evidence of that element was "overwhelming." *Legins*, 34 F.4th at 323-24. The Fourth Circuit's citation in *Legins* to the decisions of other circuit courts was merely to establish that the other courts applied harmless-error analysis to errors under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—not for the purpose of adopting the specific harmless-error analyses of those courts. *Legins*, 34 F.4th at 322.

Kahn, 58 F.4th 1308 (10th Cir. 2023), similarly conflicts with the Fifth Circuit's approach:

> Where an element of an offense is contested at trial, as it was here, the Constitution requires that the issue be put before a jury—not an appellate court. *See Neder*, 527 U.S. at 18-19. . . . For this court to now essentially retry the case on appeal and opine on what verdict the jury would have reached if it had been properly instructed asks too much of an appellate court. This is particularly true here, where we would be determining Dr. Kahn's subjective intent on a cold record. This court will not wade into the evidence to now apply the correct instructions—that is the jury's prerogative.

Id. at 1319; *but see United States v. Freeman*, 70 F.4th 1265, 1282 (10th Cir. 2023) ("[W]e reject Freeman's assertion that, pursuant to *Neder*, the omission of an element in the jury instructions cannot be harmless if the element was contested at trial.").

In addition, concerning the second part of the *Neder* test (which the Fifth Circuit applied despite the fact that petitioners had contested the misdefined element), the Fifth Circuit's "voluminous"-evidence approach clearly is at odds with other Fourth Circuit decisions that have assessed harm even when a defendant contested an omitted or misdefined element. Those decisions found harm if there was "any" evidence on which a rational juror could have had a reasonable doubt about an omitted element, even if scant or weak compared to the pros-

ecution's countervailing evidence from the appellate judges' perspective. *See, e.g.*, *United States v. Smithers*, 92 F.4th 237, 251-52 (4th Cir. 2024) ("True, much of the [defendant's] testimony wasn't particularly convincing, as weighed against the prosecution's evidence. And a jury might very well not have believed Smithers' testimony that he was acting with a legitimate medical purpose. But copious evidence of a defendant's guilt does not necessarily make an instructional error harmless."). That approach differs significantly from the Fifth Circuit's approach in petitioners' case.

The First Circuit—in cases in which a defendant (unlike Neder) had contested an omitted or misdefined element—has alternatively assessed the evidence of the element but has refused to engage in the type of "overwhelming" (or "voluminous") evidence analysis conducted by the Fifth Circuit. *See United States v. Prigmore*, 243 F.3d 1, 22 (1st Cir. 2010) ("[T]he contested nature of the testing evidence in this case might well suffice to distinguish it from *Neder* in and of itself. *In any event, while the government's evidence of the purpose behind the testing was strong, the competing evidence was not inherently incredible. That effectively ends the matter*.") (emphasis added). Because the evidence at trial permitting an acquittal of *quid-pro-quo* bribery and a conviction of *post hoc* rewards was not "inherently incredible," the alternative-theory error in petitioners' case cannot be deemed harmless.

As the foregoing discussion demonstrates, the federal circuits are in widespread disarray concerning *Neder*.

B. Several State Appellate Courts' Decisions Add to the Division Among the Lower Courts.

Respondent does not appear to dispute that some *state* appellate courts have rendered decisions applying *Neder* that conflict with the Fifth Circuit's decision in petitioners' case. *See* BIO, at 22 n.2. Nevertheless, respondent contends such a conflict is unimportant because the state courts are free to apply a "more stringent" harmless-error test. *Id.*

Respondent's position would make sense if any of the state court decisions cited in the petition (Pet. 22-23 n.22)[8] had invoked *state law* in support of the harmless-error analysis. But none did so. Instead, they all cited *Neder*—which thus adds to the inconsistent approaches in the lower courts about what the U.S. Constitution requires in an appellate court's harmless-error analysis of an element omitted from, or misstated in, jury instructions. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) (unless a state appellate court makes a "plain statement" that its harmless-error analysis of a federal constitutional violation was based on state law, this Court will assume the harmless-error ruling was based on federal law). Therefore, in deciding whether to grant certiorari, this Court should consider the division among

[8] *See also State v. Jackowski*, 915 A.2d 767, 773 (Vt. 2006) (rejecting the dissenting judges' argument that the jury instruction error was harmless under *Neder*, and concluding that "Where, as here, intent is the central—and only—issue, and the defendant presents minimally sufficient evidence rebutting intent, we cannot say that an erroneous jury instruction on that issue amounts to harmless error.").

federal *and* state appellate courts. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 34 (2013) ("We granted certiorari . . . to resolve a split among federal and state courts on whether *Padilla* [*v. Kentucky*, 559 U.S. 356 (2010),] applies retroactively.").

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Finally, although presented in the specific context of a misdefined element in jury instructions, this case also presents the Court an opportunity to provide much-needed broader guidance on the role of "overwhelming evidence" in harmless-error analysis more generally—something the Court attempted to do in granting certiorari in *Vasquez v. United States,* No. 11-199, only to dismiss the petition as improvidently granted after oral argument. *See* 566 U.S. 376 (2012).

III. *Sabri* does not foreclose petitioners' as-applied challenge to their convictions under 18 U.S.C. § 666.

Respondent contends that this Court's decision in *Sabri v. United States*, 541 U.S. 600 (2004), forecloses petitioners' as-applied challenge. BIO, at 27-28. Respondent errs. *Sabri* only addressed whether § 666 is "facially" unconstitutional. Petitioners challenge to § 666 is based on a specific ground not addressed in *Sabri*—that, when a defendant's alleged bribery offense did not cause and was not intended to cause the spending of *any* government funds (local, state, or federal), Congress lacks the power to punish such conduct under the Spending Clause. The lack of any funds being put at risk results in an unconstitutional application of § 666. *See Fischer v. United States*, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dis-

senting, joined by Scalia, J.) (stating that "[i]f Congress attempted to criminalize acts of theft or bribery based solely on the fact that—in circumstances unrelated to the theft or bribery—the victim organization received federal funds," such a statute would be unconstitutional).

Respondent also claims that petitioners' case is a "poor vehicle" to review their as-applied challenge to their § 666 convictions because it was not preserved for appeal. Respondent points to the fact that the issue was raised for the first time in a post-trial motion for judgment of acquittal under Federal of Criminal Procedure 29(c) and not raised in a pretrial motion to dismiss under Rule 12(b)(3). BIO, at 29-30. Respondent errs.

It is well-established that a claim of insufficient evidence is properly preserved for appeal even if is raised for the first time in a post-trial Rule 29(c) motion. *See United States v. Allison*, 616 F.2d 779, 783-84 (5th Cir. 1980); *United States v. Miller*, 527 F.3d 54, 60-61 (3d Cir. 2008). Petitioners' as-applied constitutional challenge to their § 666 convictions properly was raised as a claim of insufficient evidence—with the predicate argument being that, properly construing the statute to avoid unconstitutional application, § 666 does not cover their conduct. *Cf. Skilling v. United States*, 561 U.S. 358, 399-413 (2010) (assessing a constitutional challenge to the honest-services wire fraud statute in the context of the petitioner's claim that his conduct did not violate the statute); *id.* at 413 ("It is therefore clear that, as we read [18 U.S.C.] § 1346 [to avoid an unconstitutional application], Skilling did not commit honest-services fraud.").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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